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What to do about digital piracy

GLOBAL IP

Doris Estelle Long

Doris Estelle Long is a law professor, director of the Center for Intellectual Property Law, and chairwoman of the intellectual property, information technology and privacy group at The John Marshall Law School. She has served as a consultant on IPR issues for diverse U.S. and foreign government agencies, including as attorney adviser in the Office of Legislative and International Affairs of the USPTO. She can be reached at 7long@jmls.edu.

One of my favorite classic movies of the 1940s is "Everybody Comes to Rick's." You may know it under its final production name — "Casablanca."

Filmed in the exotic back lot of Warner Bros. Studios, "Casablanca" achieved its international flavor with a cast that featured outstanding foreign actors who had fled Nazi oppression for Hollywood.

Internationalism still provides a critical backdrop for the film industry. But as I learned at the Toronto International Film Festival in September, the international flavor of a film is no longer limited to exotic locales and foreign actors. Instead, co-production has gone international.

This year's 40th anniversary celebration seemed to have as many production companies from Asia, Africa and the Caribbean as it did from the United States, Canada and Australia.

Such diversity is already apparent in the subject matters, media and distribution chains. This variety is one of the growing strengths of the industry and one of its biggest challenges. People love movies — they just don't seem to want to pay for them.

Five years ago when we launched this Global IP column, I wrote about the latest attempt to stem global digital piracy: the new French "Hadopi" three-strikes law. Under this allegedly forward-looking legislation, Internet users engaged in three acts of digital piracy could be kicked off the Internet.

You can already guess the technological problems this solution posed. Despite issuing millions of notices to end users, reportedly only one user in France ever received an Internet suspension order. The law was immediately changed to permit fines but no suspension. The suspension order was canceled.

The next new solution was a series of proposed legislative and treaty-based provisions that would grant the United States the ability to criminalize digital piracy and take down offending foreign rogue websites.

The U.S. legislation — the Stop Online Piracy Act — and the multinational Anti-Counterfeiting Trade Agreement failed as a direct result of an Internet boycott organized by such powerhouses as Google, Wikipedia and the Electronic Frontier Foundation.

Although both SOPA and ACTA rapidly disappeared from the digital enforcement scene, some of their more sensitive proposals have gained new life. In fact, the concept of blocking access to pirate websites has become the new "great solution" to digital piracy. This time, they might have gotten it right.

Briefly, website blocking is achieved by a technological impediment, imposed by an online service provider, that prevents end users from accessing designated pirate websites. Such barriers include IP blocks that prohibit access to specific Internet protocol addresses, DNS blocks that halt access to specified domain names and proxy blocks that route the traffic on a site through a proxy server for filtering.

Proxy blocks have largely been rejected for their cost and potentially adverse impact on end-user privacy. IP and DNS blocks, however, have been increasingly applied in Europe and Australia.

As a result of its strong privacy protections, the European Union has insisted on "proportionality" in balancing copyright and privacy interests when seeking to impose website blocking solutions to digital piracy. Such proportionality does not prevent the enforcement of website blocking injunctions.

In *EMI Records Ltd. v. British Sky Broadcasting Ltd.*, for example, a British court found that filtering blocks that prevented end-user posts of files from The Pirate Bay, a well-known pirate website, were both proportionate and effective because copyright owners' interests "outweigh the ... rights of the users of the websites, who can obtain the copyright works from many lawful sources."

In *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH* (Case C-314/12), the Court of Justice of the European Union (the EU's Supreme Court equivalent) stressed that even if website blocking is "not capable of leading, in some circumstances, to a complete cessation of the infringements of the intellectual property right, [it] cannot ... be considered ... incompatible with the requirement that a fair balance be found."

In June, Australia amended its copyright law to permit the imposition of website blocking of an "online location," including foreign-based websites, whose "primary purpose ... is to infringe, or to ... facilitate the infringement of, copyright" (Section 115A(1), Australian Copyright Act).

The statute lists 11 non-exhaustive factors courts can consider in deciding if such a block is appropriate. Included among these factors are "the flagrancy of the infringement" and "whether it is in the public interest to disable access to the online location" at issue (Section 115A(5)).

In both the EU and Australia, website blocking can be imposed despite the existence of copyright liability safe harbors for online service providers. There is no need to find that the provider required to impose a block has violated copyright.

Instead, the block is imposed as a method of regulating the Internet to protect copyright. This approach suggests that, despite the copyright liability safe harbors granted under Section 512 of the Digital Millennium Copyright Act, the United States could impose similar injunctions.

Website blocking is not limited to pirate websites, such as The Pirate Bay. To the contrary, blocks have been ordered against Popcorn Time, a bit torrent service in the Netherlands. Other countries are expected to follow suit.

In this age of digital workarounds and computer hacks, any technological solution is necessarily flawed. Yet within three weeks of the imposition of website blocks in the Netherlands for The Pirate Bay, among other sites, traffic to these sites was reportedly reduced 98 percent.

If Rick's Café American were a pirate website, everybody might still want to come to Rick's — but with website blocks, they might find it tougher to get there.